

STATE OF MICHIGAN
COURT OF APPEALS

PEGGY SMITH,

Plaintiff/Cross-Defendant-
Appellee/Cross Appellant,

v

JESSIE L. SMITH,

Defendant/Cross-Plaintiff-
Appellant/Cross-Appellee.

UNPUBLISHED
September 15, 2005

No. 254711
Genesee Circuit Court
LC No. 01-236455-DM

Before: Meter, P.J., and Murray and Schuette, JJ.

PER CURIAM.

In this divorce case, defendant, Jessie Smith, appeals, and plaintiff, Peggy Smith, cross-appeals, as of right from the judgment of divorce entered by the Genesee Circuit Court. We affirm.

I. FACTS

The parties were married in November 1983. During their twenty-year marriage, the parties adopted a number of children, five of whom were minors at the time of trial. Defendant agreed that plaintiff have sole physical and legal custody of the children. The marital estate consisted of a seven bedroom home on Frances Road in Mt. Morris, two acres adjacent to that home, a home on Maplewood, in Flint, a 1997 Chevrolet 15-passenger van, a 1991 Dutchman 35' travel trailer, a 1996 Chevrolet Lumina, defendant's pension, defendant's Personal Savings Plan ("PSP") account, a pop-up trailer, two cemetery lots located in Flint Memorial Park, various farm equipment and tools, an interest in a timeshare with Outdoor Adventures, and each party's personal property.

Testimony indicated that plaintiff received \$3,514.12 per month in adoption subsidies because the adopted children came from troubled homes, as well as an average \$1,200-\$1,800 per month in foster care funds for foster children placed with her, all of which was tax free, while defendant earned \$4,112 per month. Plaintiff testified that she had never worked in a position where she was paid more than \$100 per week, that she did not have a high school diploma or G.E.D., and that she had stopped taking vocational classes during the marriage at defendant's insistence.

II. DIVISION OF PROPERTY

The trial court awarded plaintiff the Frances Road home subject to the mortgage, the adjacent property which was being purchased under a land contract, the passenger van, the travel trailer, the Outdoor Adventures membership (subject to an annual \$300.00 maintenance fee obligation) and the cemetery lots. The trial court awarded defendant the Maplewood home (subject to the accompanying mortgage); his PSP account (subject to the outstanding loans), the Lumina, the farm equipment and his tools. Defendant argues that the trial court's division of property was inequitable. We disagree.

A. Standard of Review

The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution in light of all of the circumstances. This division need not be mathematically equal, but "any significant departure from congruence must be clearly explained by the trial court." *Gates, supra* at 423, citing *McNamara v Horner*, 249 Mich App 177, 188; 642 NW2d 385 (2002). When dividing marital property, the trial court should consider the duration of the marriage, the contribution of each party to the marital estate, each party's age, health and needs, each party's station in life or life status, each party's earning ability, fault or past misconduct, and any other equitable circumstance. *McDougal v McDougal*, 451 Mich 80, 89; 545 NW2d 357 (1996); *Sparks v Sparks*, 440 Mich 141, 158-160; 485 NW2d 893 (1992). The determination of relevant factors will vary with the circumstances of each case, and no one factor should be given undue weight. The trial court must make specific findings regarding the factors it determines to be relevant. *Sparks, supra* at 159.

B. Analysis

Neither party asserts that the trial court's factual findings were erroneous. Rather, defendant argues that the division of property was inequitable because plaintiff received a majority of the assets and the trial court offered no reason justifying such a result.

The trial court awarded plaintiff the Frances Road home, which was appraised at \$163,000 in 1995 and at \$152,000 more recently and was subject to a mortgage of \$116,338. The trial court did not make a specific finding as to the value of the Frances Road home, but did note that the equity was argued at \$50,000 and that it may have been less than that. The trial court also awarded plaintiff property adjacent to that home, for which the parties paid \$28,500 and which remained subject to a land contract. There was no testimony as to the remaining duration of the land contract, or the amount of equity in this property. Defendant points out that the parties paid \$15,000 as a down payment when this property was purchased. Plaintiff also received the passenger van (valued at \$7,000-\$8,000), two cemetery lots (valued at \$4,375), the travel trailer (which was not valued) and the parties' Outdoor Adventures membership (subject to the \$300/year maintenance fee). The trial court awarded defendant the Maplewood home, which was valued at \$40,000 and was subject to a mortgage of \$19,600, for a net equity of \$20,400. The trial court also awarded defendant his PSP account (valued at \$18,000), a car (valued at \$2,500), a pop-up trailer (not valued) and farm equipment and tools (also not valued).

Defendant points to the difference in the value of the assets, and nothing more, as establishing that the result was inequitable. However, defendant essentially consented to the

division of assets in this manner. He asked for his home on Maplewood, the car, his PSP account, and his tools, all of which he received. He also asked for the travel trailer, which was awarded to plaintiff. Defendant agreed that plaintiff should receive the Frances Road home and the adjacent property, her share of his pension and the passenger van; asking only that the difference in the equity in the homes and in the value of the vehicles be considered by the trial court.

The trial court stated that it was taking into consideration the differences in the value of the vehicles and the equity in the homes, as well as the value of the travel trailer, and “was trying to make the most reasonable division of property” that it could. Given that plaintiff received sole custody, the court explained that it made sense for her to receive the larger house and property, the larger vehicle and the travel trailer and Outdoor adventures membership. We agree.

Further, the only assets that plaintiff received without defendant’s agreement were the travel trailer and the cemetery plots. Defendant acknowledged that the children would benefit if the travel trailer were awarded to plaintiff and consented to plaintiff receiving the Outdoor Adventures membership. Plaintiff testified that she used the travel trailer and the membership to take the children camping. Defendant asked for the trailer in case he was offered a job transfer in the event of a plant closing. As for the cemetery plots, defendant did not want them split, but did not want plaintiff to have them “for free.”

Given the nature of the parties’ marital property and defendant’s consent to plaintiff receiving the Frances Road house and adjacent property, the passenger van, and the Outdoor Adventures membership, there was not much that the trial court could have done differently. The court could have awarded defendant the travel trailer; however, given plaintiff’s actual use for the children’s benefit versus defendant’s potential use, we are not left with a firm conviction that such award was inequitable. Similarly, the trial court could have awarded defendant the cemetery plots. However, testimony indicated that plaintiff paid for them and defendant did not express any interest in receiving them; he only indicated that he did not want plaintiff to receive them “for free.” This Court has explained that the trial court’s dispositional ruling is “discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable.” *McNamara v Horner (After Remand)*, 255 Mich App 667, 670; 662 NW2d 436 (2003). Accordingly, the trial court’s division of the marital estate should be affirmed.

III. HEALTH COVERAGE

At trial, plaintiff requested that defendant be ordered to maintain continued health insurance for her pursuant to COBRA for a period of three years and thereafter, to pay for comparable health insurance for plaintiff for an additional seven years. Plaintiff also sought spousal support of \$200 per week. Defendant argued that plaintiff was not entitled to alimony and that she had no need for health insurance because insurance was provided for her at no cost as a member of the Sioux tribe. The trial court awarded plaintiff five years of health insurance coverage. The trial court did not award plaintiff any other support. Defendant contends that this was error.

A. Standard of Review

This Court reviews the trial court's determination regarding spousal support for an abuse of discretion. This Court reviews the trial court's findings of fact concerning spousal support for clear error; a finding is clearly erroneous if this Court is left with a firm conviction that a mistake has been made. If the trial court's findings of fact are not erroneous, this Court must then decide whether the spousal support ruling was fair and equitable in light of the facts. The trial court's decision regarding spousal support must be affirmed unless this Court is firmly convinced that it is inequitable. *Gates v Gates*, 256 Mich App 420, 432-433; 664 NW2d 231 (2003).

An award of spousal support is discretionary with the trial court. *Id.*, at 432. The main objective of an award of spousal support is to balance the incomes and needs of the parties in a way which will not impoverish either party; support is to be based on what is just and reasonable under the circumstances of the case. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000).

B. Analysis

In awarding plaintiff five years of health insurance at defendant's expense and no additional support, the trial court noted that it considered the length of the marriage, the health care coverage available to plaintiff through the Sioux tribe and the limitations of that coverage (requiring her to travel to the Upper Peninsula to see a doctor and excluding testing and hospitalization), the incomes of the parties and the support paid. The trial court noted that its goal was "that the parties have as equal an income so that they each can maintain a lifestyle as close as possible to what they maintained before." The court then concluded that with the support being paid by defendant and with defendant's payment of COBRA, the parties' incomes were equal. The court noted further that it accounted for the duration of the marriage in the length of time for which it ordered defendant to be responsible for providing plaintiff with health care coverage. All of those factors are proper considerations. *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003).

On appeal, defendant argues that the trial court erred in failing to make specific findings of fact regarding the appropriate factors relevant to its award of spousal support. Defendant also argues that the trial court erred in failing to consider: that plaintiff has free health care benefits available to her through the Sioux tribe; that plaintiff's "tax-free income is substantially greater than" defendant's; that plaintiff was awarded a majority of the marital estate and that defendant has a substantial child support obligation. Considering these factors, defendant asserts that the trial court abused its discretion in awarding plaintiff five years of health insurance at defendant's expense. Defendant concedes that the trial court is not required to consider or comment on each factor, but asserts that the trial court is required to make findings of fact relevant to the case before it and this trial court failed to do that.

Contrary to defendant's assertion, the trial court did consider the parties' relative incomes, plaintiff's entitlement to health care coverage from the Sioux tribe, and defendant's child support obligation in making its decision regarding spousal support. We acknowledge that the trial court could have expounded further as to its factual findings in this case. However, the trial court did indicate that it considered the factors defendant argues were pertinent and that consideration of those factors warranted the spousal support awarded. Therefore, given that plaintiff had sole physical custody of the parties' five children, we conclude that the trial court's award to plaintiff of five years of health coverage at defendant's expense was not inequitable.

On cross-appeal, plaintiff argues that the trial court erred in considering her adoption subsidy as income for the purposes of computing child support or in determining plaintiff's entitlement to alimony. In support of this assertion, plaintiff points to section 2.09(A) of the Child Support Formula Manual, which provides that

Income from means tested sources, such as Temporary Assistance to Needy Families (TANF), Family Independence Payment (FIP)(formerly AFDC), Food Stamps, Earned Income Credit (Federal Taxes), Supplemental Security Income (SSI), etc. must not be considered as income for the purpose of determining child support. [Michigan Child Support Formula Manual, 2001 Revised Edition effective July 1, 2001, p 7.]

We first note that plaintiff never objected to the consideration of her adoption subsidy payments by the trial court in computing defendant's child support obligation. Also, nothing in the quoted paragraph suggests that it applies to determinations of spousal support. Additionally, the quoted language applies only to means tested income; plaintiff herself testified that the adoption subsidy was paid because the children came from troubled homes. There was no evidence that this amount was based on the means of the family; indeed the implication was otherwise. Thus, even were 2.09(A) applicable to the determination of spousal support, plaintiff's adoption subsidy is not means tested income contemplated in that provision.

In her affidavit attached to her brief on appeal, plaintiff indicates that defendant's cost for continuation of her healthcare is \$529 per month. Given the parties' incomes, needs and stations in life, and the trial court's division of the marital estate, we cannot conclude that the trial court's denial of additional spousal support to plaintiff beyond this amount was inequitable.

IV. WRONGFUL CONDUCT OF DEFENDANT

Finally, plaintiff asks this Court to dismiss defendant's appeal or to remand this matter to the trial court because defendant has engaged in wrongful conduct by not changing her status with his employer and/or health insurance carrier from that of a covered spouse covered under his "family plan" to that of a former spouse covered by COBRA. Plaintiff acknowledges that this issue was not raised before, nor addressed by the trial court. Therefore it is not preserved for appeal and we need not address it. *Polkton Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). If plaintiff believes that defendant is acting in contravention of the divorce judgment, her proper course of action is to file a motion in the trial court to enforce that judgment. Whether defendant is complying with the divorce judgment as regards plaintiff's health care coverage requires factual determinations best made by a trial court. The necessary facts have not been presented below and there is no record before this Court sufficient to allow a determination as to the nature and/or the propriety of defendant's conduct.

Affirmed.

/s/ Patrick M. Meter
/s/ Christopher M. Murray
/s/ Bill Schuette